IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 351 OF 2004.

Mr. Mohan Yeshwant Sinai Barad,
s/o late Shri Yeshwant Sinai Barad,
r/o St. Lawrence, Agasaim,
Ilhas, Goa. .... Petitioner.

Versus

1. M/s. Zuari Real Estate Co-op. Pvt. Ltd., having its registered office at Alphonso Albuquerque Road, Panaji, Goa.
2. Sitabai Shantaram Kerkar, w/o Shantaram Kerkar, major of age, housewife.
3. Mr. Ramesh Shantaram Kerkar, s/o Shantaram Kerkar, major of age, occupation: Businessman.
   Both r/o House No.267, Agasaim, near Market, Ilhas, Goa. .... Respondents.

Shri J. Godinho, Advocate for the Petitioner.

Ms. R. Kamat, Advocate for the Respondent No.1.

Ms. K. Sambari, Advocate for the Respondents No.2 and 3.

CORAM: D. D. SINHA, J.

DATE: 12th DECEMBER, 2005.

ORAL JUDGMENT:

Heard Shri J. Godinho, learned counsel for the Petitioner and Ms. R. Kamat, learned counsel for the respondent No.1.

2. Rule. Rule made returnable forthwith by consent of the parties.

3. Writ Petition is directed against the Order dated 9.3.2004 whereby the application of the petitioner for grant of adjournment was dismissed on the ground that four adjournments were already granted to the petitioner and therefore dismissed the suit for non-prosecution.

4. The learned counsel for the petitioner contended that the petitioner/plaintiff filed Regular Civil Suit No.360/00/A for possession and cancellation of leave and licence agreement. It is contended that for the first time when the matter was listed for recording of evidence of the plaintiff was on 27.1.04. This fact is clear from the roznama dated 25.11.03. It is contended that on 27.1.04 the petitioner moved an application for grant of adjournment for the first time which was granted and the matter was kept for recording of evidence of the plaintiff on 9.3.04. It is submitted that on 9.3.04 also the plaintiff has moved an application for adjournment which was the second application of the petitioner. However, the trial Court not only rejected the application for grant of adjournment but dismissed the suit of the plaintiff for want of prosecution on the wrong assumption of fact that the plaintiff was given four adjournments in the matter.

5. Learned counsel for the petitioner states that in view of the judgment of

this Court dated 7th August, 2003 passed in Writ Petition No. 394/03, the date of hearing of the suit contemplated in Order 17, Rule 1 C.P.C. is the date on which the plaintiff is called upon to lead his evidence. It is submitted that in the instant case in view of the above referred facts, the date of hearing was 27.01.04. In the instant case the date for recording of evidence of the petitioner/plaintiff was fixed on 27.01.04. However, the petitioner sought adjournment and the next date was fixed on 9.03.04 and on that day the petitioner has moved an application for the second time seeking adjournment and therefore the order impugned is not sustainable in view of the provisions of Order 17, Rule 1.

6. The learned counsel for the respondent no.1 on the other hand contended that the petitioner was granted four adjournments prior to 9.03.04. It is submitted that though it is not specifically reflected in the roznama dated 30.09.03 that the matter is adjourned on the request of the plaintiff, however the suit was adjourned only at the behest of the petitioner/plaintiff. It is contended that the second adjournment was asked by the petitioner on 25.11.03. The third adjournment was asked on 27.01.04 and the fourth application for adjournment was made by the petitioner/plaintiff on 9.03.04 and therefore in view of the provisions of Order 17, Rule 1, particularly in view of the proviso to

Order. 17, R.1 the petitioner was not entitled to seek more than three adjournments and therefore the impugned order is just and proper.

7. I have considered the contentions canvassed by the respective counsel. Perused the provisions of Order 17, R.1. Proviso to Order 17, R.1 contemplates that the adjournment to a party shall not be granted more than three during the hearing of the suit. This provision has been considered and construed by the Judgment of this Court dated 7th August, 03 passed in W.P. No.394/03 wherein in paragraph 7 it is observed thus :-

> " It is no doubt true that in the instant case what the Court was considering was the expression ' the date of the first hearing '. However, that would have the same meaning to be assigned even in the case of the expression ' hearing of the suit '. Hearing of the suit would commence from the framing of the issues. However, as framing of the issues is a duty cast on the Court, that date or the date at which the Court may adjourn for framing the issues, cannot be counted for the purposes of considering the three

> adjournments of hearing of the suit as has been set out in the Proviso. Therefore, the date of hearing would be the date on which the plaintiff is called upon to lead his evidence. “

8. In view of the above referred observations made by this Court, it is evident that the expression ' date of hearing ' mentioned in the proviso to Order 17, R.1 is the date on which the plaintiff is called upon to adduce evidence and it is permissible for the plaintiff to ask for three adjournments in the matter, of course for legitimate and sufficient cause and it is only thereafter the Court is entitled to exercise power under O.17, R.1, particularly when there is no legitimate and sufficient cause for grant of adjournment.

9. In the instant case, the date on which the petitioner/plaintiff was called upon to give evidence was 27.01.04. The plaintiff sought adjournment on that day which was granted and the next day which was fixed for recording evidence was 9.03.04. On that day also the plaintiff made an application for grant of adjournment. However, the learned Judge not only dismissed the application, but dismissed the suit in view of Order 17, R.1. In view of the scheme of O.17, R.1 the order impugned is

completely misconceived and devoid of substance and cannot be sustained in law since the contingency mentioned in proviso to Order 17, R.1 is not attracted in view of the reasons stated above.

10. Hence the petition is allowed and the impugned order is quashed and set aside. Regular Civil Suit No.360/00/A is restored on the file of the trial Court with the direction to proceed according to law. Rule made absolute with no order as to costs.

D. D. SINHA, J.

sl.